million in claims of corporate waste (aside from its claims regarding the FDIC's interest)" and that petitioner "does not dispute that the receivership estate has senior outstanding credit obligations, including a tax liability of approximately $11.7 million." *Id.* at 17a. "Thus," the court reasoned, "even if [petitioner's] waste claims were meritorious, it would recover nothing," and petitioner lacked standing. *Ibid.*

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner first contends (Pet. 9-14) that the court of appeals improperly created a "federal rule of decision" in order to reject petitioner's state-law claim that the FDIC was unjustly enriched by paying itself interest in its capacity as subrogee of Golden Pacific's insured depositors. That contention lacks merit.

a. As a preliminary matter, petitioner does not challenge the court of appeals' conclusion that the FDIC was legally entitled to award itself interest on the more than $140 million in insurance payments that it had made, out of its own funds, to Golden Pacific's depositors. Pet. App. 4a, 39a.[2] Upon making those payments, the FDIC was "subrogated to all rights of the depositor against such institution or branch to the extent of such payment or assumption." 12 U.S.C. 1821(g)(1). As the court of appeals correctly noted (Pet. App. 13a), this Court has

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[2] Petitioner errs in implying (Pet. 6, 7) that the FDIC did not advance its own funds in payment of the insurance claims. The district court determined that the FDIC "expended its own funds to fulfill its insurance obligation." Pet. App. 39a.

held that a depositor with a claim against an insolvent nationally chartered bank is entitled to collect interest on that claim in a liquidation under the National Bank Act. See *National Bank of the Commonwealth* v. *Mechanics' Nat'l Bank*, 94 U.S. 437, 439 (1877).[3] Consistent with that principle, lower courts have specifically held that the FDIC is entitled to receive interest on amounts it paid out in satisfaction of its statutory insurance obligations, in its capacity as subrogee of the insured depositors. See *FDIC* v. *Citizens State Bank*, 130 F.2d 102, 103-104 & n.6 (8th Cir. 1942); *FDIC* v. *Iowa Growthland Fin. Corp.*, 523 N.W.2d 591, 594-595 (Iowa 1994).

b. Petitioner contends (Pet. 12) that, even assuming that the FDIC was legally *entitled* to award itself interest on its insurance payments, petitioner could nevertheless pursue an unjust-enrichment claim against the

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[3] A depositor in a bank chartered under New York law is similarly entitled to receive interest from the receiver, provided that all of the creditors have recovered their principal. See *People* v. *American Loan & Trust Co.*, 65 N.E. 200, 201 (N.Y. 1902). The court of appeals did not specifically address the question whether the right of a depositor in Golden Pacific to receive post-insolvency interest was supplied by federal or state law. Since the events at issue in this litigation, Congress has expressly authorized the FDIC to promulgate rules enabling it "to make payments of post insolvency interest to creditors holding proven claims against the receivership estates of insured Federal or State depository institutions" following satisfaction of the principal amounts of those claims (and to establish a uniform national rate for such interest payments), 12 U.S.C. 1821(d)(10)(C), and the FDIC has promulgated such rules, 12 C.F.R. 360.7. To the extent that the right to interest in this case was supplied by federal law, any state-law unjust-enrichment claim based on the FDIC's exercise of that right would arguably be preempted. The FDIC did not affirmatively argue below that petitioner's unjust-enrichment claim was preempted, however, and does not pursue that argument before this Court.

FDIC under New York law on the ground that it was "inequitable" for the FDIC to do so.[4] Petitioner claims that the court of appeals erred by adopting a "special federal rule of decision applicable to unjust enrichment claims against the FDIC," Pet. 14, under which "the FDIC's *legal* entitlement to certain payments operated to bar any *equitable* recovery by petitioner," Pet. 11. Petitioner is wrong in both respects.

In the first place, petitioner cites no authority for its assumption (Pet. 12) that, under New York law, a claimant's legal right to receive interest on its claims against a receivership estate would be trumped by a showing that "equity and good conscience" would lead to a different result. In New York, as elsewhere, "equity follows the law." 55 *New York Jurisprudence 2d* § 86, at 664 (2002). In particular, "[i]n the administration of assets equity does not interfere with absolute legal priority." *Id.* at 665. Thus, petitioner has not established that even the bright-line rule purportedly adopted by the court of appeals would have been inconsistent with New York law.

In any event, the court of appeals did not adopt any such bright-line federal rule of decision, but instead concluded only that, based on the circumstances of this

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[4] To the extent that petitioner contends (Pet. 11, 13-14) that the FDIC (in its capacity as receiver) breached its fiduciary duty by paying itself interest (in its corporate capacity as insurer), that claim lacks merit. The payment of interest did not constitute "self-dealing" (Pet. 14), because (as courts have consistently held) the FDIC is treated as two separate entities when it acts in its capacities as receiver and insurer. See, *e.g.*, *FDIC* v. *Roldan Fonseca*, 795 F.2d 1102, 1109 (1st Cir. 1986). The necessary (and perverse) consequence of petitioner's position would be to require the FDIC affirmatively to *prefer* claims by other creditors to claims by the FDIC itself in its capacity as subrogee of insured depositors.

case, there were no "genuine issues of material fact" that precluded the FDIC from obtaining summary judgment on petitioner's state-law unjust-enrichment claim. Pet. App. 12a. At the outset of its analysis, the court listed the elements of an unjust-enrichment claim under New York law, including the requirement that a plaintiff must show that "equity and good conscience required the plaintiff to recover the enrichment from the defendant." *Id.* at 13a n.8. And while the court noted that the FDIC was legally entitled to award itself interest on its insurance payments, *id.* at 13a, the court did not stop there—as one would naturally expect if the court had adopted the bright-line rule that petitioner suggests. Instead, the court of appeals proceeded to consider the equities of the FDIC's decision to award itself interest, first noting that the awarding of interest was necessary to make the FDIC whole (and thus to protect the integrity of the FDIC's insurance fund), *id.* at 14a, and then discounting the allegation that it was not the FDIC's ordinary practice to recover post-insolvency interest, *id.* at 16a. Although the court did not conclude in so many words that the equities favored the FDIC,[5] the court did so implicitly in holding that the FDIC was entitled to summary judgment on petitioner's state-law unjust-enrichment claim. That portion of the court of

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[5] Petitioner chastises the court of appeals (Pet. 12 n.4) for failing expressly to find that the FDIC's decision to pay itself interest "comported with principles of equity." It is hardly surprising, however, that the court of appeals did not make such a "finding," because petitioner did not even list (much less rely on) the elements of an unjust-enrichment claim in the relevant portions of its briefs in that court. See Pet. C.A. Br. 24-43; Pet. C.A. Reply Br. 1-14.

appeals' opinion therefore presents no question of federal law that warrants this Court's review.[6]

c. Petitioner also contends (Pet. 14 & n.5) that the court of appeals' decision conflicts both with this Court's "admonition" in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994), that a court ordinarily may not adopt a federal rule of decision unless "there is a 'significant conflict between some federal policy or interest and the use of state law,'" *id.* at 87 (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)), and with various decisions by lower courts applying state law to claims involving the FDIC. The decision below is not inconsistent with the decisions on which petitioner relies, however, for the simple reason that the court of appeals did not adopt a federal rule of decision, but instead merely applied state law. Because the relevant portion of the court of appeals' opinion presents no question of federal law, it *a fortiori* presents no conflict on a question of federal law that merits further review.

2. Petitioner next contends (Pet. 15-19) that the court of appeals erred by upholding the district court's decision to grant summary judgment on its state-law claim that the FDIC engaged in corporate waste, on the ground that petitioner lacked standing because the IRS had a superior claim of greater value against the bank's estate. That contention also lacks merit.

a. As an initial matter, petitioner implicitly concedes that, if the IRS had a valid claim against Golden Pa-

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[6] Petitioner contends (Pet. 12 n.4) that the court of appeals could not have resolved its unjust-enrichment claim at the summary-judgment stage because "the equities of the FDIC's administration of the estate are the central disputed issue in the case." Petitioner, however, identifies no relevant dispute on a specific *factual* issue that would have precluded the court of appeals from entering summary judgment.

cific's estate, that claim would have had priority over any claim by petitioner in its capacity as shareholder. See, *e.g.*, 12 U.S.C. 194.[7] Petitioner likewise implicitly concedes that, if the IRS had a valid claim against the bank's estate whose value exceeded that of petitioner's corporate-waste claim, petitioner would lack constitutional standing because petitioner would be unable to demonstrate that it had suffered injury in fact from the alleged waste. See, *e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (defining an "injury in fact" as "a harm that is both concrete and actual or imminent, not conjectural or hypothetical" (internal quotation marks omitted)).

Petitioner instead makes the fact-bound contention (Pet. 16-17) that, notwithstanding the facts that the IRS had determined that Golden Pacific had tax deficiencies and that the FDIC, in its capacity as receiver, had acknowledged that those deficiencies amounted to approximately $11.7 million, the IRS did not have a valid claim for that amount—either because the IRS had not yet formally assessed those deficiencies (since it was precluded by statute from doing so until it appeared that there were remaining assets in the estate), or because the value of the IRS's claim would remain uncertain until the IRS made such an assessment. Even if it had been properly preserved, that fact-bound question would not warrant further review. But petitioner failed to challenge the validity or value of the IRS's claim against the bank's estate before the court of appeals, instead

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[7] In 1993, Congress enacted the national depositor preference statute, which gives priority to claims by the FDIC and depositors over other creditors but reaffirms the preexisting principle that all other claims have priority over claims by shareholders. See 12 U.S.C. 1821(d)(11)(A).

arguing only that the FDIC should be estopped from relying on the IRS's claim because the IRS had disagreed with the OCC's determination that Golden Pacific was *insolvent*. Pet. C.A. Br. 44 n.23; Pet. C.A. Reply Br. 15.[8] This Court's practice is not to consider questions that were neither pressed nor passed upon below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Petitioner also suggests (Pet. 15) that the court of appeals erred by "implicitly" treating the outstanding portion of the FDIC's claim for interest as superior to petitioner's corporate-waste claim, notwithstanding the fact that petitioner was separately contesting the validity of the FDIC's claim. The court of appeals, however, merely noted that "[petitioner] does not dispute that the receivership estate has senior outstanding credit obligations, *including* a tax liability of approximately $11.7 million." Pet. App. 17a (emphasis added). To the extent that the court of appeals suggested that the estate had other superior obligations besides the IRS's claim, that suggestion was indisputably correct insofar as *other* creditors besides the FDIC had outstanding interest

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[8] Petitioner suggests (Pet. 18) that it had claimed that the FDIC's agreement with the IRS, in which it conceded the amount of the tax deficiencies, itself constituted a "fiduciary breach," and that the court of appeals, by holding that petitioner lacked standing on its corporate-waste claim, "essentially granted a default judgment to the FDIC on the principal point of contention." In its complaint, however, petitioner nowhere alleged that the FDIC breached its fiduciary duty by acknowledging that Golden Pacific had outstanding tax liabilities in the amount of approximately $11.7 million—nor, in fact, did petitioner so much as refer to the agreement between the FDIC and the IRS. See, *e.g.*, First Am. Compl. paras. 86-89 (breach-of-fiduciary-duty claim).

claims against the estate—claims whose validity petitioner does not contest. In any event, because the court of appeals determined that the value of the IRS's claim exceeds the value of petitioner's corporate-waste claim, the court of appeals would have concluded that petitioner lacked constitutional standing regardless of the existence of other superior claims.[9]

b. Petitioner asserts that the court of appeals' decision "cannot be reconciled * * * with the federal courts' 'virtually unflagging' obligation to adjudicate cases on their merits." Pet. 19 (quoting *New Orleans Pub. Serv. Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (*NOPSI*)). The court of appeals' decision, however, is entirely consistent with the settled principle (which *NOPSI* does not address) that federal courts lack jurisdiction to consider claims brought by plaintiffs who have failed to demonstrate injury in fact. And although petitioner makes the fact-bound contention that the IRS did not have a valid superior claim, it seemingly concedes that the court of appeals' decision is otherwise consistent with the Ninth Circuit's decision in *Herring* v. *FDIC*, 82 F.3d 282 (1995), cert. denied, 519

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[9] In a footnote, petitioner suggests (Pet. 18 n.9) that its corporate-waste claim against the FDIC was worth more than the $7.9 million suggested by the court of appeals, because it also included the approximately $11.2 million in post-insolvency interest that the FDIC paid to itself. Before the court of appeals, however, petitioner conceded that its corporate-waste claim was worth only $7.9 million. See, *e.g.*, Pet. C.A. Br. 45 (referring to "[petitioner's] claim for repayment of $7.9 million); Pet. C.A. Reply Br. 14 (referring to "[petitioner's] $7.9 million corporate waste claim"). Although petitioner originally asserted a corporate-waste claim based on the FDIC's decision to pay itself interest, petitioner apparently did not pursue that claim before the court of appeals, see Pet. App. 12a-13a, and does not pursue that claim before this Court, see Pet. 9-14.

U.S. 1027 (1996), which held that a plaintiff lacks standing to bring a state-law claim against the FDIC in its capacity as receiver if other creditors possess superior claims of greater value against the bank's estate. *Id.* at 285. As with petitioner's unjust-enrichment claim, therefore, petitioner identifies no conflict concerning its corporate-waste claim that merits further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

GOLDEN PACIFIC BANCORP,

*Petitioner,*

v

FEDERAL DEPOSIT INSURANCE CORPORATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The FDIC's brief in opposition is striking in that it fails even to acknowledge the existence of its state-law fiduciary duty, when acting as a receiver, to husband the assets of the receivership estate, *see Bank of Tokyo Trust Co. v. Urban Food Malls Ltd.*, 650 N.Y.S.2d 654, 665 (App. Div. 1996), and its concurrent duty, under federal law, to "pa[y] over to the shareholders," any "remainder of the proceeds," 12 U.S.C. § 194 (2005). The omission is telling because it demonstrates that, even today, the FDIC does not take seriously those obligations. That is the point of this petition.

No less than any other receiver, the FDIC has obligations that accompany its rights. Inasmuch as those fiduciary duties arise exclusively from state law, state law is the primary, if not the only, vehicle by which a shareholder or creditor can vindicate their performance. The decision below, however, renders state law of fiduciary duty ineffectual—powerless to govern the conduct of a federal receiver—and replaces it with a federal rule that effectively entitles a federal receiver to do as it pleases. That decision contravenes the Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and effectively eliminates state-law regulation of federal receivers. This Court's review is warranted.

* * *

The FDIC does not dispute that in 1990, after nearly five years of gross mismanagement by the FDIC receiver, and after all depositors and creditors had been paid in full, Golden Pacific National Bank ("Bank") still held net assets of more than $15 million. *See* Pet. 2-3. Under federal law, the FDIC should have terminated its receivership at that time and paid the remaining funds to the Bank's shareholders. *See* 12 U.S.C. § 194. Instead, the FDIC did not "inactivate[]" the receivership until another five years had passed. Opp. 3. The only thing the FDIC did during those five years is expropriate to itself the $15 million of assets that rightfully be-

longs to the Bank's shareholders. It accomplished this principally by reimbursing itself exorbitant expenses (including $1.94 million for salaries in 1994—and for what?) and paying itself more than $11 million in "interest."

Petitioner sued the FDIC, alleging egregious breaches of the FDIC's fiduciary duties to the Bank's shareholders. Its complaint raised state-law causes of action in equity for unjust enrichment and corporate waste. The district court gave petitioner's claims the back of its hand. It granted summary judgment on petitioner's unjust enrichment claim on the basis that the FDIC had legal authority to pay itself post-insolvency interest, ignoring the fact that the FDIC could have used (and indeed, as a fiduciary, was required to use) the Bank's assets to pay the depositors (thereby accruing no interest expense) and the uncontroverted evidence that the FDIC had never previously exercised this ostensible authority. Pet. App. 48a-49a. On the corporate waste claim, the district court reached the improbable conclusion that the allegation of waste of at least $8 million was insufficient to state an injury in fact. *Id.* 30a. The court found that petitioner's corporate waste claim had been eclipsed by a phony $11.7 million tax claim manufactured by an agreement between the FDIC and the Internal Revenue Service. *Id.* 24a-25a. The court of appeals affirmed the grant of summary judgment on both claims without stating additional or alternative grounds. *Id.* 12a-18a.

The courts below thus never adjudicated petitioner's claims on the state-law equitable terms on which they were premised. In so doing, they contravened decisions of this Court and severely constricted the remedies available to shareholders when a federal receiver violates the fiduciary duties imposed by state law. This case warrants this Court's review.

## I. The FDIC's Assertion That The Court of Appeals "Applied State Law" Is Completely Belied By The Decision Below

The FDIC asserts that the courts below "did not adopt a federal rule of decision, but instead merely applied state law" in rejecting Golden Pacific's equitable claim for unjust enrichment. Opp. 12. In support of this assertion, the FDIC contends that (1) "equity follows the law," Opp. 10 (quoting 55 NY JUR. EQUITY 2d § 86, at 664 (2002)), and (2) the court of appeals considered all the relevant equitable factors in any event and "implicitly" concluded that "the equities favored the FDIC," *id.* at 11. The FDIC's argument is supported only by moonbeams; it grossly distorts both New York principles of equity and the decisions below.

1. Equity does not, as the FDIC would have it, merely "follow the law." Indeed, if the FDIC were right, there would be no need for the treatise on New York principles of equity that it cites as authority to this Court. As that treatise states, though, "[w]hile equity follows the law, it does not do so at all times or in craven dependence upon the law." 55 NY JUR. EQUITY 2d § 86, at 664. Insofar as "[t]he overwhelming command of the law in a proceeding in equity is to do justice," *id.* § 84, at 662, "[e]quity will not allow the rigid rules of law to work an injustice," and will "depart from the rules of law which stand as a barrier to the accomplishment of equity." *Id.* § 86, at 664.

The equitable action for unjust enrichment thus empowers courts to look past "rigid rules of law" to correct injustice. *See id.* § 69, at 649 ("Equity may be impelled to action through any of its formulas of expression where . . . unjust enrichment [may have been] achieved"). Therefore, notwithstanding any legal entitlement the FDIC may have had to pay itself interest on outlays (if any) it incurred to cover insured deposits, if petitioner can demonstrate that those payments unjustly enriched the FDIC—*i.e.*, that those payments offended "equity and good conscience"—then petitioner is entitled to restitution of those interest payments. *See id.* § 100,

at 679 ("A cause of action for unjust enrichment requires the court to determine whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered") (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chipetine*, 634 N.Y.S.2d 469 (App. Div. 1995)). The courts below overlooked this fundamental principle of equity, to which the FDIC has no answer other than misdirection.

2. The notion that the court of appeals "consider[ed] the equities of the FDIC's decision to award itself interest," and "implicitly" concluded that "the equities favored the FDIC" (Opp. 11) is the product of wishful thinking rather than any plausible reading of the decisions below. In granting summary judgment to the FDIC on petitioner's claim for unjust enrichment, the district court reasoned that "the *only* . . . question is whether interest payments are among the 'rights of the depositor' [subrogated to the FDIC] under the language of 12 U.S.C. § 1821(g) and thus whether the FDIC-C was entitled to interest." Pet. App. 45a (emphasis added). Having concluded *only* that interest payments are not precluded by the statute, the district court then held that the "FDIC is entitled to that payment of interest on the funds that it extends when it is subrogated to the rights of depositors." *Id.* 49a. Nowhere in the district court's discussion of petitioner's unjust enrichment claim is there an analysis of the defendant's conduct—required under New York law—to determine whether equity and good conscience nevertheless demanded that the FDIC's decision to pay itself interest, *regardless* of statutory entitlement, be set aside. Nor could there be. The district court granted summary judgment on the unjust enrichment claim. Any discussion of the equities necessarily would have raised disputed issues of fact such as whether the FDIC actually expended any of its own funds to settle the claims of the Bank's insured deposits, and, if so, whether the FDIC used its funds instead of the Bank's assets in order to manufacture a claim for post-insolvency interest and deny the shareholders a recovery.

It is obvious enough from the text of its decision that the court of appeals did not, as the FDIC now suggests, under-

take even an "implicit[]" analysis of the equities involved in petitioner's unjust enrichment claim. Opp. 11. This is not one of the rare cases in which the court of appeals invoked its power to affirm summary judgment on a basis fairly found in the record but nevertheless different from that incanted by the district court. *See, e.g., Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 90 (2d Cir. 2003). In reviewing the grant of summary judgment, rather than asking whether the district court correctly concluded that there was no issue of material fact as to whether equity and good conscience permitted the payment of post-insolvency interest, the court of appeals (just as the district court had done) addressed only "whether the FDIC, as subrogee to the claims of a failed bank's FDIC-insured depositors, may collect post-insolvency interest on those claims from the failed bank's estate." Pet. App. 2a-3a. The court of appeals concluded that "such interest payments are not improper," not because equity and good conscience permitted the payments, but rather because of the "statutory scheme" and "the general proposition that creditors to a liquidation are entitled to interest." Pet. App. 13a. From these *legal* precepts, the court of appeals concluded, "[i]t follows that the FDIC . . . is entitled to post-insolvency interest." Pet. App. 14a.

The FDIC contends, though, that the court of appeals "did not stop there" but rather went on, after reaching its holding also to "consider the equities of the FDIC's decision to award itself interest." Opp. 11. That contention is refuted by the court of appeals' opinion itself. The FDIC first points to the sentence immediately after the holding, which states that a contrary holding "would give Bancorp the windfall of essentially an interest-free loan, and leave the FDIC with no compensation for the loss of the use of the funds it advanced." Pet. App. 14a; *but cf. O'Melveny & Myers*, 512 U.S. at 88 ("Our cases have previously rejected 'more money' arguments remarkably similar to the one made [by the FDIC] here."). Far from analyzing petitioner's equitable claim, this sentence merely reflects the fact that it had already been rejected. The return of post-insolvency interest to

petitioner would constitute a "windfall" only if the payment of post-insolvency interest itself was just. It is also premised on a disputed fact (*i.e.*, whether the FDIC actually expended any funds) and is contravened by the federal statute that *requires* the FDIC to pay the shareholders "any proceeds" after the liquidation—windfall or no. 12 U.S.C. § 194.

Other than the stray "windfall" reference, the FDIC points only to the court of appeals' dismissal of petitioner's undisputed evidence that the FDIC had previously followed an unbroken practice of *not* charging post-insolvency interest. The court of appeals found this undisputed evidence inconsequential, though, not because (as the FDIC suggests) it was outweighed by the countervailing equitable factors, but rather because "internal agency practices do not create legal rights in third parties." Pet. App. 16a (citing *Clarry v. United States*, 85 F.3d 1041, 1048 (2d Cir. 1996)). Of course, petitioner did not claim that the agency practice established a *legal* right to the return of the interest payments. Petitioner presented the evidence of the agency's practice to demonstrate that the unprecedented interest payments were, in these circumstances, *inequitable*. The court of appeals thus disposed of petitioner's equitable unjust enrichment claim without any reference to state-law principles of equity.

3. Nowhere in its brief in opposition does the FDIC take issue with petitioner's contention that if the court of appeals adopted a federal rule of decision to resolve petitioner's equitable state-law claims, the decision of the court of appeals would contravene this Court's decision in *O'Melveny & Myers*, 512 U.S. at 87, and accordingly warrant review by this Court. Instead, notwithstanding the failure of both courts below to engage in any meaningful analysis of the equities presented by petitioner's claim for unjust enrichment, the FDIC quixotically clings to the notion that the courts below "merely applied state law," Opp. 12. As demonstrated above, however, this is transparently not the case. The reliance of the courts below on the FDIC's legal entitlement to post-insolvency interest to reject petitioner's equitable claim for unjust enrichment amounts to a special federal common-

law rule of decision for state-law equitable claims against federal receivers. The application of this new rule for federal receivers threatens to displace New York law of unjust enrichment, just as in *O'Melveny & Myers*, where the FDIC's suggested federal common-law rule sought to displace California's law concerning imputation of knowledge.

## II. By Acknowledging That The IRS Has Made No Assessment On Petitioner, The FDIC All But Confesses Error On The Standing Question

The FDIC maintains that petitioner lacked standing to prosecute its claim against the FDIC for corporate waste "because the IRS had a superior claim of greater value against the bank's estate." Opp. 12. According to the FDIC (and the court of appeals), the existence of the IRS tax claim means that petitioner cannot "demonstrate that it had suffered injury in fact from the alleged waste." *Id.* 13. This is plainly wrong, and indeed, the FDIC concedes as much in its brief in opposition.

The FDIC does not dispute that it is only the act of assessment that creates a tax liability. *See* Pet. 17 (citing, *inter alia*, *Rambo v. United States*, 492 F.2d 1060, 1061 n.1 (6th Cir. 1974)). The FDIC also concedes that, to date, "the IRS has never assessed Golden Pacific's tax deficiencies." Opp. 4. In the absence of the assessment, there can be no liability to the government—no "superior claim of greater value"—that would deprive petitioner of standing to bring its claim for corporate waste. Far from a "fact-bound contention" (Opp. 15), the absence of a tax liability to the IRS is conceded by the FDIC. Accordingly, the closing agreement between the FDIC and the IRS presents no obstacle to petitioner's Article III standing to bring its corporate waste claims against the FDIC.*

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* The Ninth Circuit's decision in *Herring v. FDIC*, 82 F.3d 282 (9th Cir. 1995), is thus easily distinguished. In *Herring*, the court of appeals concluded that the FDIC had a claim superior to that of the shareholders only after concluding that "the shareholders have no chance of recovering

Notwithstanding the manifest errors of the courts below, the FDIC lacks even the good grace to consent to a remand. Instead, desperate to preserve its favorable result and avoid adjudication of the merits of petitioner's claims, the FDIC now argues that this Court should decline review of the question because it was not "properly preserved" and "[t]his Court's practice is not to consider questions that were neither pressed nor passed upon below." Opp. 13, 14 (citing, *inter alia*, *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam)). This outlandishly obstreperous argument is only the latest example of inequitable conduct by the FDIC in its dealings with petitioner.

First, the FDIC's reliance on this prudential maxim is badly misplaced here, where the question concerns standing. This Court not only has the authority, but the obligation to review questions implicating its jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." (internal quotation marks omitted)).

More fundamentally, though, the notion that petitioner did not allege an injury in fact, or that the courts below did not pass upon the FDIC's objections to petitioner's Article III standing, is completely absurd. From the beginning of the litigation, petitioner alleged that it had been injured by the FDIC's waste of the Bank's corporate assets. The FDIC first raised the IRS closing agreement to contest petitioner's standing eight years later, and successfully convinced the courts below of the merit of its position. Having prevailed on its late-blooming jurisdictional argument, the FDIC can-

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on their underlying claim." *Id.* at 285. In this case, far from demonstrating the validity of the IRS claim, the FDIC has conceded its non-existence.